Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

No. 98–1072

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

PAUL E. PATTON, - - - - *Cross-Petitioner*

versus

ROBERT E. GABLE; A.B. CHANDLER, III; KENTUCKY REGISTRY OF ELECTION FINANCE; DONALD L. COX; MORRIS E. BURTON; JAMES E. BOYD; and JOHN Y. BROWN, III,
- - - - - - - - - - - *Cross-Respondents*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITION TO CROSS-PETITION

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1099

QUESTION PRESENTED

Was the court of appeals correct to hold that a total ban on a candidate's expenditure of personal funds on his own campaign during the twenty-eight days preceding an election violates the candidate's rights of free speech and association?

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OPINIONS BELOW

The opinion of the court of appeals is reported at 142 F.3d 940 (6th Cir. 1998), and is reprinted in the Petition for Certiorari in *Gable v. Patton*, No. 98–897, at Pet. App. 1a. The opinion of the district court is unreported, and is reprinted in the Petition for Certiorari in *Gable v. Patton*, No. 98–897, at Pet. App. 28a.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1998. Petitions for rehearing were denied on July 28, 1998. The petition for certiorari in *Gable v. Patton*, No. 98–897, was docketed in this Court on November 30, 1998. The cross-petition was docketed in this Court on December 31, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition for Certiorari in *Gable v. Patton*, No. 98–897, at 2.

STATEMENT OF THE CASE

Kentucky law prohibits all slates of candidates for Governor and Lieutenant Governor, including those who elect not to participate in the state's public financing scheme, from accepting any contributions during the twenty-eight days preceding a primary or general election. Ky. Rev. Stat. § 121A.030(5). This prohibition applies to candidates' expenditures of their own funds upon their own campaigns as well as to contributions from outside sources. Pet. App. 4a. The question presented for review in the cross-petition, Cross-Pet. at i, incorrectly suggests that this prohibition extends solely to a candidate's "personal contributions to her own campaign *in excess of the voluntary spending limits*" (emphasis added). But the prohibition is not so limited; it bars any expenditure of the candidate's own funds in the twenty-eight days before an election regardless of how much that candidate has spent before that period begins.

In reviewing the constitutionality of this twenty-eight day "window," both the district court and the court of appeals distinguished its effects on candidates' expenditure of personal funds from its effects on contributions from outside sources. In a portion of the decision below that petitioner/cross-respondent Gable challenges in his

petition for certiorari, the court of appeals held that "the 28-day Window is constitutional with respect to external contributions." Pet. App. 19a. The court reasoned that, while "the application of *Buckley* to the instant case is far from straightforward," forcing candidates to "rearrange their fundraising by concentrating it in the period before the 28-Day Window begins" was "justified by Kentucky's interest in combating corruption." Pet. App. 19a.

But the court of appeals reached the opposite conclusion with respect to internal expenditures, holding that "the 28-Day Window is unconstitutional when it prohibits a non-participating candidate from contributing to his own campaign." Pet. App. 24a. The court accepted that "'[t]he central holding'" in *Buckley v. Valeo*, 424 U.S. 1, 54 (1976), "'is that spending money on one's own speech must be permitted.'" Pet. App. 20a (quoting *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2321 (1996) (Kennedy, J., concurring in the judgment and dissenting in part)). The court likewise acknowledged that restrictions upon expenditures of political funds impose a far greater burden on free speech than do restrictions upon political contributions. Pet. App. 21a. And the court found Kentucky's spending ban indistinguishable "from the internal expenditure provision struck down in *Buckley*." Pet. App. 24a.

The court of appeals rejected outright Kentucky's efforts to depict its twenty-eight-day spending ban as a mere "financial technicality," Pet. App. 22a, or "'time, place and manner restriction.'" Pet. App. 23a. To the contrary, the court held, the effects of the spending ban on a candidate's campaign are "substantial, rather than just being a matter of timing." Pet. App. 23a. As the court elaborated:

> [The ban] forces a candidate to decide in advance how much of his own money he will spend, before he has a chance to assess the public opinion polls and actions of his opponents in the last month of the campaign. Moreover, it would simply not be feasible for a candidate to deposit virtually all of his personal resources in the campaign account in

> advance, just in case he decides, during the last twenty-eight days, to spend those resources on his campaign. . . . [I]t is unlikely that all of the candidate's personal resources will be liquid. . . . [And] the candidate cannot easily take back his money if it is unexpended at the end of a campaign [see Ky. Rev. Stat. § 121.180(10)]. In sum, it is disingenuous for Defendants to argue that the 28-Day Window does not burden a candidate's ability to spend personal funds on his own campaign.

Pet. App. 22a-23a (footnote omitted). Accordingly, the court of appeals held itself bound by this Court's "clear statement that 'the First Amendment simply cannot tolerate' this type of restriction on the freedom of a candidate to speak on his own behalf." Pet. App. 24a (quoting *Buckley*, 424 U.S. at 54).

REASONS FOR DENYING THE CROSS-PETITION

The cross-petition raises no novel or pressing issue worthy of this Court's review. Contrary to cross-petitioner's assertions, the issue presented in the cross-petition *was* resolved by this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), as the court below correctly decided. *Buckley* established unambiguously that limitations upon political expenditures trigger strictest scrutiny. It also made clear that such limitations cannot be justified by any interest in preventing corruption or the appearance of corruption, since a candidate cannot possibly corrupt himself, nor by any interest in equalizing the amounts of money spent by various candidates in a campaign, since such an interest is "wholly foreign to the First Amendment," 424 U.S. at 45.

Because the legal principle *Buckley* established with respect to political expenditures is so clear, the cross-petition stands or falls on its attempt to distinguish *Buckley* on the facts. As cross-petitioner would have it, Kentucky has not limited "the *amount* of money" that candidates may spend in support of their own campaigns, Cross-Pet. at 8, but rather merely "the time in which the candidate's money must be deposited to the candidate's campaign account and reported," Cross-Pet. at 9.

As the court of appeals correctly observed, however, this attempted distinction is "disingenuous." Pet. App. 23a. An absolute ban upon political expenditures during the last month of an election campaign limits the quantity, not merely the timing, of a candidate's speech. It irrevocably forecloses a candidate's expenditure of funds to respond to late-breaking events in a campaign. It irrevocably bars him from using his own money to respond to an opponent's unanticipated negative attacks. It irrevocably bars him from using his own money to state his position on unanticipated developments in the news or unanticipated policy initiatives announced by the incumbent government. It irrevocably bars him from using his own funds to announce new endorsements as a campaign draws to a close. In short, it imposes upon a candidate an irreversible penalty for failing to be a perfect clairvoyant one month before an election.

Kentucky's law thus imposes a "direct quantity restriction on political communication" that is necessarily prohibited by this Court's decision in *Buckley*, 424 U.S. at 18. To call the twenty-eight-day ban on expenditures a "time" regulation is wordplay. Unlike classic time regulations such as bans on soundtrucks after midnight, which aim at ends such as residential tranquility that are unrelated to the suppression of free expression, Kentucky's law aims quite intentionally at the restriction of speech. As cross-petitioner Patton frankly admits, Kentucky's goal is to protect candidates who participate in its public financing scheme from "be[ing] surprised by" expenditures on speech "by wealthy opponents" in the late stages of a campaign. Cross-Pet. at 11. Such a goal is obviously related to the suppression of free expression. In short, the month-long Kentucky ban is no more a mere timing restriction on political speech than a law that authorizes the publication of newspapers or books on politics during only eleven months of the year.

Even if the Kentucky law were characterized as a mere time restriction on electoral speech, this Court's decisions make clear that restrictions inhibiting political speech during a time period close to an election are highly suspect. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983) (invalidating early filing deadline for independent candi-

dates); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating durational residency requirement for voting); *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating twenty-four-hour blackout of political editorials on election eve). *See also Harman v. Forssenius*, 380 U.S. 528, 539 (1965) (noting that poll taxes that had to be paid "long before the election" penalized those "voters who did not plan so far ahead"). For this reason, even independent of *Buckley*, the result reached by the court of appeals with respect to internal expenditures was correct.

Finally, resolution of the question presented in the cross-petition is not a pressing matter of national importance. Kentucky is unable to name a single other state that has imposed such a substantial restriction on personal expenditures by a candidate in the weeks preceding an election as the one struck down below. The California law that it cites, for example, merely requires nonparticipating candidates to provide "sufficient notice" that they are approaching the spending ceilings imposed upon participating candidates, Cal. Gov. Code § 85404 (cited in Cross-Pet. at 11), and cross-petitioner neglects to mention that the only court yet to review California's campaign finance scheme has enjoined its key provisions as presumptively unconstitutional. *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998); *aff'd*, 1999 U.S. Lexis 16 (9th Cir., Jan. 5, 1999). Accordingly, there is no danger of electoral disruption or confusion if the decision of the court of appeals with respect to internal expenditures is left standing.

CONCLUSION

In contrast to the issues presented in the petition for certiorari in *Gable v. Patton*, No. 98–897, the issue presented in the cross-petition is resolved by *Buckley* and does not warrant this Court's review. Thus, if this Court grants the petition, it should nonetheless deny the cross-petition.

Respectfully submitted,

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January 29, 1999